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Supreme Court, U.S.
FILED

No. _____ 08-327 SEP 8 - 2008

In The OFFICE OF THE CLERK
Supreme Court of the United States

STATE OF ARIZONA; TERRY GODDARD, Arizona Attorney General; PAUL CARTER, Assistant Attorney General; DORA B. SCHRIRO, Director Of The Arizona Department Of Corrections,

Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA; ROBERT V. TUZON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In suits filed pro se by inmates against prison employees and officials, judges of the United States District Court for the District of Arizona habitually issue orders requiring the Defendants, their attorneys, and unnamed prison officials to investigate the inmates' allegations and to file with the court and serve on the plaintiffs a verified report informing them of the facts learned from the investigation and identifying what responses the Department of Corrections would make to the allegations. There are several important questions about the district court's power to enter such orders:

1. A rule of civil procedure promulgated by this Court requires the parties in most suits to exchange disclosure statements, but it specifically exempts suits filed pro se by prison inmates. Do the district judges have the power to, in essence, enact their own rule – inconsistent with this Court's rule – requiring the defendants in pro-se inmate suits to unilaterally provide super disclosure statements?

2. The Prison Litigation Reform Act requires inmates to exhaust administrative remedies before filing suit; it does not allow them a second chance if they fail to properly and timely do so. The district judges' orders require prison officials to respond to inmates' allegations, even when their claims would be barred because they failed to exhaust administrative

QUESTIONS PRESENTED – Continued

remedies available under prison grievance procedures. Does the district court have the power to abrogate the PLRA?

3. Under separation-of-powers principles, the judicial branch cannot co-opt the executive branch involuntarily into performing tasks for it. Similarly, under federalism principles, a federal court cannot co-opt a state government agency to do its bidding. Do district judges exceed powers by ordering state prison officials to investigate and report to the court on inmates' unproven allegations?

4. Due process requires courts to act neutrally and fairly toward the parties; courts must have jurisdiction over the parties. The district court in these cases requires only the defendants – and related officials of the Arizona Department of Corrections, who are not parties to the suit – to conduct an investigation and disclose facts, with no similar requirement made of the inmates–Plaintiffs. Do these unilateral orders violate the due-process rights of the Defendants and associated persons?

PARTIES TO THE PROCEEDING

The Petitioners are the State of Arizona, its Attorney General Terry Goddard, Assistant Attorney General Paul E. Carter, and Director Dora Schriro of the Arizona Department of Corrections.

The Respondents are the United States District Court for the District of Arizona, and former inmate Robert Tuzon, who filed an action in the district court under 42 U.S.C. § 1983, naming as defendants several Arizona prison officials and employees.

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OPINIONS BELOW

The decision of the Ninth Circuit Court of Appeals is reported: *In re Arizona*, 528 F.3d 652 (9th Cir. 2008). It is included as Appendix A.

The decision of the district court is unreported: *Tuzon v. Chewall, et al.*, 2005 WL 2412811, No. CV-04-00235-TUC-FRZ (D. Ariz. October 30, 2008). It is included as Appendix B.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its decision on June 9, 2008. No rehearing was sought or ordered. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Respondent Tuzon filed suit under 42 U.S.C. § 1983, alleging violations of his federal constitutional rights. The Respondent United States District Court for the District of Arizona had jurisdiction under 28 U.S.C. § 1341 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

CONSTITUTIONAL AND STATUTORY PROVISIONS

Federal Rule of Civil Procedure 26(a) is included as Appendix C.

42 U.S.C. § 1997e(a) is included as Appendix D.

STATEMENT OF THE CASE

The Petitioners ask this Court to grant certiorari to settle a dispute between them and various judges of the Arizona federal district court. When lawsuits filed by unrepresented prison inmates are assigned to these jurists, these judges habitually enter an order that requires defense counsel and officials of the Arizona Department of Corrections – who are not parties to the actions – to do the following:

- investigate the inmates' allegations;
- make a decision whether to take any action in response to the inmates' claims;
- provide the court a written report – supported by affidavits – summarizing the investigation and the responses, if any, that ADC intends to take in response to the claims; and
- provide a copy of the report to the inmate–plaintiffs.

The judges have no authority to issue these orders, which contravene a rule of civil procedure

promulgated by this Court and a statute enacted by Congress. These orders are unfair: they treat one side of the lawsuit more favorably than the other without justification. And the court does not even have jurisdiction over some of the parties who are subjected to these orders.

Faced with all these problems, the Ninth Circuit nonetheless affirmed the Order at issue in this case. Thus, the Petitioners turn to this Court to instruct the lower courts to conduct themselves within the bounds of their powers.

A. Material Facts and Course of Proceedings.

The Plaintiff Robert V. Tuzon, a convicted felon, was serving a life term with the Arizona Department of Corrections. (After the Ninth Circuit issued its Opinion, he was released on parole. Given the relief he requests in his Amended Complaint, his release does not moot his cause of action.) Tuzon is an experienced litigator, having represented himself in numerous lawsuits, many of which he has appealed to the Ninth Circuit. He sued various ADC officials under § 1983, alleging various, largely unrelated violations. (Dkt. 16.) He sought various types of relief, including compensatory damages, punitive damages, and various forms of injunctive relief. (*Id.*; Dkt. 18 at 2.)

In accordance with the Prison Litigation Reform Act of 1996, 28 U.S.C. § 1915 ("PLRA"), the District Court screened the Complaint, entering its Screening

Order. (Dkt. 18.) It allowed him to proceed with the following alleged claims:

- Against ADC Officer Escarcega, Sergeant Silva, Officer Lowe, Deputy Warden Taylor, and Captain Ochoa for failing to protect him from assaults by gang members. (*Id.* at 3-4, 9.)

- Against librarian Fry and Mr. Dees for confiscating various legal materials that led to the denial of parole. (*Id.* at 5, 7.)

- Against Taylor for denying him food for 104 days in retaliation for his accusations against Officer Escarcega. (*Id.* at 7-8.)

- Against Deputy Warden Martinez for subjecting him to cruel and unusual punishment by making him work as a lead cook, knowing that he was medically limited to light duties. (*Id.* at 10.)

- Against Mr. Chenail for denying him prescription eyeglasses. (*Id.* at 10.)

The district court dismissed several counts for failure to state a claim against various ADC officials, including Director Dora Schriro, based on his allegations that they had failed to report one of the assaults against him to prosecuting authorities. (*Id.* at 11-12.) It also dismissed:

- His claim that various ADC officials had confiscated his legal mail and files. (*Id.* at 6-7.)

- His due-process claim based on a prison official's confiscation of his funds. (*Id.* at 8-9.)

- His retaliation and due-process claims against a prison sergeant. (*Id.* at 9.)

- His retaliation and Eighth Amendment claims against a prison health administrator based on treatment that he had provided for Tuzon's skin infection. (*Id.* at 10-11.)

The District Court then entered the Order at issue here. (Dkt. 43 [Appendix B].) It required defense counsel, the Defendants, and non-defendant parties associated with them, to investigate Tuzon's allegations, to propose possible administrative resolutions, and to prepare a written report, supported by affidavits, outlining their findings. (*Id.*) The Order states:

> B. Defendants or officials responsible for the operation of the appropriate institution are directed to undertake a **review** of the subject matter of the Complaint to:
>
> 1. Ascertain the facts and circumstances underlying the Complaint; and
>
> 2. Consider whether any action can and should be taken by the institution or other appropriate officials to resolve the subject matter of the Complaint.
>
> C. Defendants are directed to **file a written Report with this Court on or before 1/12/07.** Defendants **shall furnish** Plaintiff a complete copy of the Report and all attachments at the time the Report is filed.

1. The Report shall include, but shall not necessarily be limited to, a thorough explanation of the actions complained of in the Complaint.

2. The Report shall state the results, if any, of the review undertaken by the officials responsible for the institution.

3. Any facts alleged in the Report shall be affirmed under oath by affidavit. **Defendants shall not base any factual allegations on unsigned affidavits.**

4. The Report shall include copies of any documents pertaining to the administrative record.

5. Copies of all affidavits, reports, other records, etc., shall be attached to the Report at the time that it is filed.

(*Id.* at 1-2.) The Order requires nothing of Tuzon. (*Id.*, passim.)

Various Arizona district court judges had entered orders substantially similar to the Order at issue here. Some of them granted the Arizona Attorney General's motions to reconsider and strike provisions like those contained in the Order. (Petition for Writ of Prohibition, Exs. 9 and 10.) Others declined to do so. (*Id.*, Exs. 11-13.)

The Defendants moved for reconsideration of the Order. (Dkt. 44.) Tuzon responded, attesting that he is "a competent adversarial party." (Dkt. 45, ¶ 3, ¶ 9(a).) He acknowledged that he was aware of the

concept of discovery in civil litigation and his own obligations under Rule 11. (*Id.*, ¶¶ 8 and 9.) Finally, he asserted that the parties should work together and get to the core of the case "without [the] Court's intervention until needed." (*Id.*, ¶ 9(b).) The district court denied the Motion for Reconsideration, stating only that there was "no basis to depart from its original decision." (Dkt. 48.) The Defendants moved to stay enforcement of the Order pending a Petition for Writ of Prohibition to be filed in the Ninth Circuit. (Dkt. 51.)

The Defendants then moved to dismiss the Complaint based on Tuzon's failure to exhaust administrative remedies under the PLRA. (Dkt. 55.) They simultaneously moved to stay discovery, including the requirement to file the report required by the Order. (Dkt. 56.) While these motions were pending, they filed their Petition for Writ of Prohibition in the Ninth Circuit Court of Appeals, seeking an order prohibiting the district court from entering and enforcing the subject portions of the Order (the "Petition").

Before the Ninth Circuit ruled on the Petition, the District Court granted the Defendants' Motion to Dismiss in part and denied it in part, further denying as moot their Motion to Stay Discovery, but granting their request to stay enforcement of the requirement to investigate and report as to the subject matter of Tuzon's claims, pending the resolution of their Petition. (Dkt. 76.) The Parties then cross-moved for summary judgment. (Dkt. 81, 84, 90, 94, 95, 97.)

On June 9, 2008, the Ninth Circuit denied Defendants' Petition for Writ of Prohibition. *In re Arizona*, 528 F.3d 652 (9th Cir. 2008) (Appendix A).

On July 22, 2008, the district court granted the Defendants' Motion for Summary Judgment in part and denied it in part, at the same time denying Tuzon's Motion in its entirety. (Dkt. 101.) Defendants timely moved for a new trial and for reconsideration of the denial of qualified immunity to Defendant Escarcega on August 4, 2008. (Dkt. 102.) The District Court directed Tuzon to file a response to the Motion by September 10, 2008. (Dkt. 104.)

Both while the Petition was pending and after the Ninth Circuit issued its Opinion, judges in the district court have again issued orders similar to the one at issue here. *E.g.*, *Cardella v. Flanagan*, D. Ariz. No. CV 05-154-TUC-RCC (Dkt. 41 filed Dec. 10, 2007); *Fierro v. Richardson*, D. Ariz. No. CV 07-580-TUC-DCB (Dkt. 17 filed July 17, 2008); *Brinkman v. Schriro*, D. Ariz. No. CV 06-512-TUC-CJK (Dkt. 39, filed May 18, 2007).

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to rein in the district judges in Arizona who are exceeding their lawful authority. The Court must step in because the Ninth Circuit failed in its duty to control the courts under its charge.

I. The Court Should Grant Certiorari to Reassert Its Authority and Supremacy in Promulgating Federal Rules of Procedure.

This Court has the responsibility and the power to adopt rules of civil procedure (with Congressional approval). Lower courts are not free to impose their own procedures that directly conflict with the rules that this Court has adopted. But the district court here, with the Ninth Circuit's blessing, did just that, ordering one-sided disclosure in a pro-se inmate case, when this Court has decreed that there shall be no disclosure in such cases.

Congress has the original authority to prescribe the rules of procedure for the federal courts. *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 5 n.3 (1987) (citing U.S. Const. art. III; U.S. Const. art. I, § 8, cl. 18). In the Rules Enabling Act, Congress delegated the rulemaking authority to this Court while maintaining oversight over the rules so adopted. 28 U.S.C. § 2072; 28 U.S.C. § 2074; *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10, 15 (1941).

This Court has adopted a rule mandating that parties to civil proceedings mutually exchange disclosure statements revealing, among other things, known facts, witnesses, and exhibits. Fed. R. Civ. P. 26(a)(1) (Appendix C). But it has specifically decreed that this mutual disclosure exchange does not apply in certain cases, including "an action brought without counsel by a person in custody of . . . a state, or a

state subdivision. . . ." Fed. R. Civ. P. 26(a)(1)(E)(iv) (Appendix C).

The district judge here, along with other district judges and magistrate judges, acting with the Ninth Circuit's endorsement, have essentially abrogated Rule 26(a)(1)(E)(iv). They require super disclosure statements in pro-se inmate cases: cases that are specifically exempt from the disclosure requirement. Worse still, as noted above, the super disclosure that they have mandated is not mutual. So the lower courts here have not only adopted a de facto rule in contravention of this Court's dictates, they have done so in a unilateral – and therefore unfair – fashion.

Congress has provided that the rules of procedure in the district courts are to be only those adopted under, or consistent with, the Rules Enabling Act. "All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." 28 U.S.C. § 2072(b); *accord* 28 U.S.C. § 2071(a) ("The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title."). This Court has reiterated that rule, decreeing that the district courts may only adopt local rules that are "consistent with . . . federal statutes and rules adopted under 28 U.S.C. §§ 2072 and 2075." Fed. R. Civ. P. 83(a)(1). Local rules that are inconsistent with the rules of civil procedure are unenforceable. *See, e.g., Reese v. Herbert*, 527 F.3d

1253, 1268-69 (11th Cir. 2008) (refusing to enforce local rule inconsistent with rule of civil procedure governing movant's burden in granting summary judgment); *Hajek v. Burlington N. R.R. Co.*, 186 F.3d 1105, 1109 (9th Cir. 1999) (local rule regarding waiver of objection to hearing by magistrate judge was invalid because it conflicted with statutes and rules on the subject). The Arizona District Court has not officially promulgated a super-disclosure rule in pro-se inmate cases, but the district judges who habitually enter orders similar to Appendix B have created a de facto rule of procedure in their courts. Their actions are no less valid for being informally implemented than would have been a formal rule promulgated by the entire court.

This Court should grant certiorari to assert and solidify its supremacy over the lower federal courts and to clarify that the lower courts can neither create nor enforce procedural rules – whether de facto or officially promulgated – that conflict with this Court's rules.

II. The Court Should Grant Certiorari to Clarify the Role of Administrative Exhaustion Under the Prison Litigation Reform Act.

The Prison Litigation Reform Act requires inmates to pursue and exhaust available prison administrative remedies as a prerequisite to a suit under § 1983: "No action shall be brought with respect to

prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). (Appendix D.) The exhaustion requirement provides prison officials with a valuable right of avoiding litigation on the merits of a claim against them. *E.g., Perez v. Wis. Dep't of Corr.*, 182 F.3d 532, 536 (7th Cir. 1999). The purpose of the exhaustion requirement is to enable the parties to try to resolve their issues administratively and avoid the burdens of litigation. *Porter v. Nussle*, 534 U.S. 516, 524-25 (2002).

The exhaustion provisions of the PLRA are mandatory. *Booth v. Churner*, 532 U.S. 731, 740 (2001). An inmate's failure to properly and timely comply bars the action. *Woodford v. Ngo*, 548 U.S. 81, 90 (2006). This means that an inmate who does not act timely to seek prison review of his grievances loses his opportunity to ask the prison officials to conduct an inquisition into his complaints; he does not get a second chance. Yet, the district court here – like judges in other cases in the district court – gave Tuzon that unauthorized second chance when it required prison officials to undertake a similar review. This thwarts the congressional purpose behind the PLRA.

The Ninth Circuit ignored the Prison Litigation Reform Act problem. (Appendix A, passim.) This Court should step in to make clear to the lower courts that they must comply with the PLRA.

III. The Court Should Grant Certiorari to Establish the Limits of the District Courts' Powers Under the Separation of Powers and Principles of Federalism.

The judicial system in the United States of America is adversarial, not inquisitorial. American judges are supposed to act as neutral arbiters or referees, not investigators for one side or the other. And even if American judges were inquisitors, they have no power – under principles of both federalism and separation of powers – to require executive officials of state government to undertake their investigations.

The judge in this case, like judges and magistrate judges in other similar cases, has co-opted the services of officials and employees of the Arizona Department of Corrections to undertake a judicial investigation of unproven allegations. This action crosses the line of judicial power, failing to recognize the limited powers of the judiciary at the same time it crosses boundaries of federalism. This raw abuse of power should be stopped, and this Court's action is necessary to achieve that.

Tuzon, a former state prison inmate, has alleged that several officers and employees of the Arizona Department of Corrections committed various unconstitutional acts against him. It is, of course, his right to file suit in the federal court, just as it is the right and duty of the court to adjudicate the dispute. But courts are supposed to act as arbiters or referees, not

investigators. "The premise of our adversarial system is that trial courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan,* 714 F.2d 171, 177 (D.C. Cir. 1983) (quoting *Ala. Power Co. v. Gorsuch,* 672 F.2d 1, 7 (D.C. Cir. 1982)). Since the courts themselves are not inquisitors, it follows that they have no power to co-opt other organizations to undertake an inquisition. Neither does the judiciary have the power to direct a co-equal branch of government – the executive – to undertake such an inquisition.

Furthermore, a federal court has no power to require the executive branch of a *state* government to undertake such an inquisition. This is all the more so because the district court's order here requires state prison officials to divert resources away from the intractable problems of prison administration and devote them to investigating the as-yet unproven allegations that Tuzon has brought in this case (and that other prison inmates have brought in numerous other lawsuits). This Court has repeatedly cautioned the federal courts to stay out of the day-to-day administration of state prisons, both on separation-of-powers and federalism principles. *E.g., Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974), *overruled on other grounds*, *Thornburgh v. Abbott*, 490 U.S. 401 (1989). The courts must grant a government agency the "widest latitude in the dispatch of its own internal affairs." *Rizzo v. Goode*, 423 U.S. 362, 378 (1976). "[I]t is not the role of courts, but that of the political

branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution." *Lewis v. Casey*, 518 U.S. 343, 349 (1996). "[P]roper balance in the concurrent operation of federal and state courts counsels restraint against the issuance of injunctions against state officers." *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974).

The threshold for federal-court involvement in prison operations is therefore a proven violation of the law: "When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." *Id.* at 405-06. By requiring Arizona prison officials to investigate the allegations that prisoners raise in their all-too-easy-to-file lawsuits, the courts inevitably interfere with prison operations and infringe on limited – and shrinking – resources. Thus, this Court should grant certiorari to remind the Ninth Circuit and the district court of the principles laid out in *Lewis v. Casey* and to require them to apply those principles:

> It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm. . . . It is for the courts to remedy past or imminent official interference with individual inmates' presentation of claims to the courts; it is for the political branches of the State and Federal Governments to manage prisons in such fashion that official interference with the presentation of claims will not occur. Of course, the two roles

> briefly and partially coincide when a court, in granting relief against actual harm that has been suffered, or that will imminently be suffered, by a particular individual or class of individuals, orders the alteration of an institutional organization or procedure that causes the harm. But the distinction between the two roles would be obliterated if, to invoke intervention of the courts, no actual or imminent harm were needed, but merely the status of being subject to a governmental institution that was not organized or managed properly. If – to take another example from prison life – a healthy inmate who had suffered no deprivation of needed medical treatment were able to claim violation of his constitutional right to medical care, . . . simply on the ground that the prison medical facilities were inadequate, the essential distinction between judge and executive would have disappeared: it would have become the function of the courts to assure adequate medical care in prisons.

Lewis v. Casey, 518 U.S. at 349-50.

The lower courts here have ignored *Lewis v. Casey*'s requirement that an inmate must prove that he has suffered actual harm before a federal court may order prison officials to take action. They have required prison officials to investigate Tuzon's claims and to consider whether to take appropriate responsive action. This is both premature and tardy. It is premature because at the time they are supposed to conduct this review and possibly act to Tuzon's

benefit, Tuzon has not yet proved that he has suffered any actual harm. It is tardy because the Prison Litigation Reform Act requires inmates like Tuzon to seek similar administrative remedies *before* filing suit. *See* Argument § II, supra.

IV. The Court Should Grant Certiorari to Give Guidance to the Lower Courts to Protect the Due-Process Rights of Parties and Non-Parties.

Courts are supposed to be neutral arbiters of the cases and controversies that come before them; they are supposed to give equal treatment to both sides of any lawsuit. This principle applies whether the party is an individual, a trade union, a corporation, or a government. And it applies not only to the ultimate decision but how the parties are treated in the conduct of the case. The fundamental tenet underlying the concept of due process of law is that the parties – both sides of a conflict – are supposed to be treated fairly. Neither the district court's order nor the Ninth Circuit's opinion achieves that end.

The Order tilts the playing field for Tuzon and against the Defendants by requiring the Defendants (and associated persons) to conduct – at taxpayer expense – an investigation to prove or disprove Tuzon's allegations. This is unfair and violates the Defendants' due-process rights.

The Federal Rules of Civil Procedure help secure a party's right to fundamental fairness in court proceedings. The district court, on its own initiative,

flouted the rules when it directed the Defendants to provide Tuzon with far more disclosure than Rule 26 allows. It did so without ordering Tuzon to provide reciprocal disclosures to the Defendants.

The Order forces the Petitioners (and associated persons who are not parties to the proceeding) to essentially prepare Tuzon's case for him, at least the factual side of it: It requires the Petitioners – but not Tuzon – to investigate Tuzon's claims. It requires the Petitioners – but not Tuzon – to disclose facts. It requires the Petitioners – but not Tuzon – to file affidavits supporting those disclosed facts, and forces them to do so without benefit of mutual discovery. It requires the Petitioners to address the merits of Tuzon's claims before he has even proven them. By entering the Order, the district court therefore transformed the Defendants and associated persons into investigators for Tuzon and the court; it denied them the right to defend themselves pursuant to a fair and orderly adversarial process.

Furthermore, the Order purports to wield power over ADC officials even though it has not obtained personal jurisdiction over them. Having jurisdiction to act is the most basic element of a court's power over a party. Neither the Ninth Circuit nor the District Court recognized or applied this simple tenet.

The Petitioners pointed out the fundamental unfairness of the Order. But the Ninth Circuit turned a deaf ear: it acknowledged that the Petitioners had raised due-process concerns (Appendix A at 7a), but it

did not even address them (*id.*, passim.) This Court should step in to instruct the lower courts that they must give equal treatment to all litigants who come before them, including the States and their officials and employees. It should grant certiorari to ensure that courts do not exceed their lawful bounds by making orders – with the implied threat of contempt of court for failing to comply – against persons over whom it has not obtained jurisdiction.

CONCLUSION

The Court should grant this Petition for Certiorari.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: STATE OF ARIZONA; TERRY GODDARD; PAUL CARTER; DORA B. SCHRIRO,	
STATE OF ARIZONA; TERRY L. GODDARD, Arizona Attorney General; PAUL CARTER, Assistant Attorney General; DORA B. Schriro *Petitioners,* v. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, *Respondent,* ROBERT V. TUZON, *Real Party in Interest.*	No. 07-70300 D.C. No. CV-04-00235-FRZ OPINION

Petition for Writ of Prohibition
Submitted May 7, 2007
Filed June 9, 2008
Before: Alex Kozinski, Chief Judge, Ronald M. Gould and Consuelo M. Callahan, Circuit Judges.
Per Curiam Opinion

COUNSEL

Paul E. Carter, Dennis P. Schaack, and Terry Goddard, Phoenix, Arizona, for the petitioners.

Hon. Frank R. Zapata, Phoenix, Arizona, for the respondent.

Robert V. Tuzon, Tucson, Arizona, for the real party in interest.

OPINION

PER CURIAM.

This is a petition for a writ of prohibition. Petitioners—State of Arizona, its Attorney General Terry Goddard and Assistant Attorney General Paul E. Carter[1]—seek our intervention, pursuant to 28 U.S.C. § 1651(a), to prohibit the district court from enforcing portions of a scheduling order entered in a prisoner civil rights lawsuit filed by real party in interest Robert V. Tuzon. Petitioners object to provisions of the order that call for petitioners to undertake a review of the subject matter of Tuzon's amended complaint, and to file a report with the district court about their findings. We requested a response from the district court because the propriety of the district court's order is an issue of first impression in this

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[1] Petitioners have filed a motion to add Dora B. Schriro, Director of the Arizona Department of Corrections, as a petitioner. We grant that motion.

circuit. We have reviewed the responses from the district court, petitioners and the real party in interest, as well as the record of the district court case, and we deny the petition.

I. FACTS AND PROCEDURAL HISTORY

On May 6, 2004, Tuzon filed a complaint seeking relief under 42 U.S.C. § 1983. On March 1, 2005, the district court screened the complaint, granted Tuzon *in forma pauperis* status and directed that the complaint be served. On January 17, 2006, Tuzon filed an amended complaint alleging, *inter alia,* damages in connection with (1) an attack on Tuzon by other inmates on September 17, 2003; (2) confiscation of Tuzon's legal documents by prison library staff in December 2003; (3) confiscation of Tuzon's money in July 2003, and ongoing through the date of the complaint; and (4) inadequate medical treatment.

On April 3, 2006, after screening the amended complaint, the district court dismissed certain claims and defendants without prejudice, and directed the remaining defendants to file answers to the remaining claims. The district court concluded that Tuzon had stated claims for deliberate indifference to his safety and for denial of access to the courts. The district court dismissed claims that defendants had confiscated Tuzon's personal property and had been deliberately indifferent to his medical needs.

The defendants duly served three separate answers. After the final one was filed, the district

court issued the scheduling order that is the subject of this petition. The order requires that defendants review the subject matter of the complaint in order: (1) to ascertain the facts and circumstances underlying the complaint; and (2) to consider whether any action can and should be taken by the institution or other appropriate officials to resolve the subject matter of the complaint. Defendants were further ordered to file a written report with the court, which includes: (1) a thorough explanation of the actions described in the complaint; (2) the results, if any, of the review undertaken by officials responsible for the institution; (3) affidavits to support any facts alleged in the report; and (4) copies of any documents pertaining to the administrative record. The remainder of the order schedules various deadlines for discovery and motions practice.

Defendants' response to the order was due on January 12, 2007. On January 10, 2007, defendants filed a motion to dismiss the complaint, alleging that Tuzon failed to exhaust his claims because he did not complete available administrative grievance procedures with respect to any of the counts alleged in the complaint. On July 27, 2007, the district court granted in part and denied in part defendants' motion to dismiss, and further stayed enforcement of the order pending disposition of this petition.

II. DISCUSSION

Standard of Review

In determining whether a writ of prohibition should issue, we consider the following factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to attain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the district court's order is clearly erroneous as a matter of law; (4) whether the district court's order is an oft-repeated error or manifests a persistent disregard for the federal rules; and (5) whether the district court's order raises new and important problems or issues of law of first impression. *Calderon v. U.S. Dist. Court,* 134 F.3d 981, 983 & n. 3 (9th Cir. 1998). Although all five factors need not be satisfied for the writ to issue, the absence of clear error as a matter of law is often dispositive. *See McDaniel v. U.S. Dist. Court,* 127 F.3d 886, 888 (9th Cir. 1997) (absence of clear error may itself dispose of petition).

We review the district court's order for clear error as a matter of law. *See Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Court,* 408 F.3d 1142, 1146 (9th Cir. 2005) (seeking writ of mandamus to overturn order to produce documents). Here, this standard is informed by the general principle that district courts have wide latitude in controlling discovery, which we review for an abuse of discretion. *See id.* at 1146-47; *see also*

Childress v. Darby Lumber, Inc., 357 F.3d 1000, 1009 (9th Cir. 2004).

The issue presented here is one of first impression; specifically, whether a district court has the authority to require a defendant to prepare a *Martinez* report. *See Martinez v. Aaron*, 570 F.2d 317 (10th Cir. 1978) (per curiam).[2] The purpose of the report "is to give the court the benefit of detailed factual information that may be helpful in identifying a case involving a constitutional challenge to an important, complicated correctional practice, particularly one that may affect more than the inmate who has filed the 1983 action." *Lewis v. Fong*, Nos. 86-3465, 86-4011 and 86-4616, 1986 WL 12781, *1-2, 1986 U.S. Dist. LEXIS 17837, at *5 (E.D. Pa. Nov. 12, 1986). In *Martinez*, the court indicated that a "record" could be created by requiring state authorities to use administrative or grievance procedures. 570 F.2d at 319-20. The court also explained that the record is especially important to develop the facts as to the color of state law and to enable the trial court to make preliminary decisions on issues like jurisdiction. *Id.*

The Federal Judicial Center has also acknowledged the utility of *Martinez* reports: "By ordering a

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[2] A district court recently directed defendants to file a *Martinez* report, finding authority to do so from *Martinez*, another Tenth Circuit opinion and the Federal Judicial center's report on managing civil litigation. *Orr v. Dawson*, No. CV06-53-S-BLW, 2006 U.S. Dist. LEXIS 68943, at *12 (D. Idaho Sept. 25, 2006).

defendant to file a *Martinez* report early in the litigation, the court can in some cases save time and effort—either that required to dispose of frivolous cases on motion or that required to deal formally with a problem the penal institution might be able and willing to address informally." Federal Judicial Center, *Resource Guide for Managing Prisoner Civil Rights Litigation* § III.C.3.c.3 at 33 (1996).

Petitioners contend that the district court's order is clearly erroneous for five reasons: (1) the order requires a "unilateral super-disclosure" in violation of Federal Rule of Civil Procedure 26; (2) the order grants Tuzon impermissible and excessive injunctive relief; (3) the order circumvents the requirement that Tuzon exhaust his administrative remedies before filing suit and denies petitioners the benefit of their defense that Tuzon failed to exhaust; (4) the order violates petitioners' due process rights and denies them the benefit of a qualified immunity defense; and (5) the order creates an ethical quandary for petitioners' counsel.

We conclude that the district court did not err or abuse its discretion in directing that petitioners investigate Tuzon's claims and present their findings to the court and to Tuzon. The nature of Tuzon's claims, as well as the timing of the district court's order, satisfies us that under the circumstances in this case any burden of production was appropriately shifted to petitioners.

District Court Discretion in Managing Prisoner Civil Rights Litigation

As the parties seem to agree, there is no specific statutory authority either permitting or forbidding the requested report, although the Fifth and Tenth Circuits have approved the use of such reports.[3] *See, e.g., Norton v. Dimazana,* 122 F.3d 286, 292 (5th Cir. 1997); *Martinez,* 570 F.2d 317; *Hardwick v. Ault,* 517 F.2d 295, 298 (5th Cir. 1975). Absent statutory mandate or precedent from the Supreme Court or the Ninth Circuit, we cannot conclude that the order is erroneous as a matter of law, as that term is used in mandamus analysis. *See Bauman v. U.S. Dist. Court,* 557 F.2d 650, 660 (9th Cir. 1977) (district court order not clearly erroneous where there were no Supreme Court or Ninth Circuit decisions deciding the issue and where there was split of authority in other circuits).

We start with first principles. Federal Rule of Civil Procedure 16 vests the district court with early control over cases "toward a process of judicial management that embraces the entire pretrial phase, especially motions and discovery." Fed. R. Civ. P. 16 advisory committee's note, 1983 Amendment; *see* Fed. R. Civ. P. 16(a) ("In any action, the court may order the attorneys and any unrepresented parties to

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[3] The Eighth Circuit affirmed a dismissal based upon a report, but did not specifically address the report's propriety. *See Hendricks v. Havener,* 587 F.2d 21 (8th Cir. 1978).

appear for one or more pretrial conferences. . . . "). Rule 16 further recognizes the inherent power of the district court to enforce its pretrial orders through sanctions, Fed. R. Civ. P. 16(f), and the discretion of the district judge to apply an appropriate level of supervision as dictated by the issues raised by each individual case. *See, e.g.*, Fed. R. Civ. P. 16(c)(2).

For example, district courts are to issue a scheduling order within 120 days after service of the complaint on the defendant, setting various deadlines for joinder, amendment of pleadings, motions and discovery, but the order may also include "other appropriate matters." Fed. R. Civ. P. 16(b). Failure to comply with the scheduling order exposes a party to "any just orders," as determined by the district judge, including dismissal, entry of default or contempt of court. Fed. R. Civ. P. 16(f), 37(b)(2).

While the scope of the district court's authority over pretrial proceedings is broad, it is tempered in pro se prisoner civil rights cases. For example, Federal Rule of Civil Procedure 26 specifically exempts pro se prisoner lawsuits from the initial disclosure requirements, Fed. R. Civ. P. 26(a)(1)(B)(iv), and from initial conference requirements, Fed. R. Civ. P. 26(f). *Cf.* Fed. R. Civ. P. 26(b)(1) ("For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action."). The district court is not required to conduct a pretrial conference in prisoner cases, though there is no rule forbidding it. *See* Fed. R. Civ. P. 16(a).

In addition, a district court must determine at the outset of the litigation or suit whether a pro se prisoner has filed a colorable action. *See* 28 U.S.C. § 1915A(a)-(b). After screening, the district court may order a response to any surviving claims and the case proceeds as any ordinary civil litigation would, with a few exceptions. For example, the parties may take discovery and file dispositive motions. *See generally* Fed. R. Civ. P. 12, 26.

In this case, the district court did not order production of the *Martinez* report until after petitioners had filed their answer. Since that time, the district court has ruled on petitioners' Rule 12(b) motion, concluding that certain of Tuzon's claims were either exhausted or did not require exhaustion.[4] Thus, this

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[4] In their "Unenumerated Motion to Dismiss Under Rule 12(b)," petitioners sought to dismiss all of Tuzon's claims on the basis that he failed to exhaust them before filing suit.

In particular, as to Count I, defendants initially argued that plaintiff submitted no inmate letter or grievance. When Tuzon attached copies of his inmate letter, grievance, and appeal to the Director as exhibits to his response, defendants "conducted an investigation and now assert that Plaintiff's Grievance documents are genuine and that he submitted the documents to security officers assigned to his housing unit, but the documents were not forwarded to . . . [the] Grievance Coordinator." Order dated July 27, 2007, at 4.

Furthermore, in reviewing plaintiff's alleged failure to grieve his denial of eyeglasses (Count IX), defendants initially alleged that plaintiff had not exhausted his remedies, but subsequently "acknowledge[d] that the grievance was filed under the wrong number and that the grievance log entry notes 'whole file missing.'" *Id.* at 10.

was not a situation where a defendant was called upon to create a record at the outset of the litigation in order to assist the district court to screen the complaint or to determine jurisdiction. However, because the district court has identified defects in the administrative record at this point, an investigation and report seem not only prudent but necessary to determine whether this case involves a legal challenge to an important complicated constitutional issue that may affect more inmates than Tuzon. *See Lewis,* 1986 WL 12781, *1-2, 1986 U.S. Dist. LEXIS 17837, at *5.

The Order Does Not Provide Tuzon with Impermissible Injunctive Relief

Petitioners allege that the order provides Tuzon with prospective or injunctive relief, as defined in 18 U.S.C. § 3626, because the terms of the order award Tuzon relief other than compensatory money damages. *See* 18 U.S.C. § 3626(g)(7).

Petitioners' definition of "prospective relief" under the statute is correct. However, petitioners provide no authority for their proposition that the terms of the order, issued *sua sponte* by the district court under Federal Rule of Civil Procedure 16, constitute "relief" to Tuzon. *See, e.g., Orange County v. Hongkong and Shanghai Banking Corp. Ltd.,* 52 F.3d 821, 825 (9th Cir. 1995) (fundamental characteristics of injunction include design to accord or to protect some or all of the substantive relief sought by

a complaint in more than a preliminary fashion). Tuzon did not request the report in his complaint. Instead, the district court appears to have issued the order in connection with the district court's customary pretrial management prerogatives as a way to create an administrative record to assist the district court and to structure the direction of the litigation. The information to be provided is consistent with ordinary pretrial obligations and reporting requirements in non-prisoner civil cases, where both parties have an affirmative duty to allege at the pretrial conference all factual and legal bases upon which they wish to litigate the case. *See Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609-10 (9th Cir. 1992).

Moreover, at this stage, the order does not implicate concerns about overreaching by the district court into daily prison administration. *See Lewis v. Casey*, 518 U.S. 343, 361-63, 116 S. Ct. 2174, 135 L.Ed.2d 606 (1996). Petitioners contend that the order overreaches because it directs prison administrators (including non-defendants) to perform certain tasks and presumably to allocate resources to perform those tasks. We reject this contention for the following reasons. First, a review of the district court docket reflects that several non-parties have already provided affidavits in support of petitioners' Rule 12(b) motion, and also appear on petitioners' trial witness list. *See, e.g.*, Defs. Mot. to Dismiss, Ex. George Decl., Ex. Olson Decl., Defs. Witness List. Second, petitioners provide no information about the

amount or kind of additional work the non-parties would have to perform in order to comply with the terms of the order, as opposed to the amount and kind of work they would ordinarily perform for any other prisoner lawsuit or the work they have already performed for this case. Because we cannot analyze the unique burden this order places on petitioners and their employees, we decline to speculate whether the district judge has impermissibly over-reached into daily prison administration.

The Order Does Not Deprive Petitioners of Their Qualified Immunity Defense

Petitioners argue that the order denies them the benefit of their qualified immunity defense. But petitioners are free to raise the immunity issue at any time and could have raised it in their Rule 12(b) motion, which was filed before this petition. If petitioners choose to await the disposition of their exhaustion defenses before raising immunity claims, that is certainly their prerogative; however, it is factually inaccurate to allege that the order, rather than petitioners' trial strategy, forecloses the benefits of their immunity defense.

Petitioners' Remaining Claims are Either Moot or Not Ripe

Petitioners argue that the order forces government counsel into an ethical quandary and forecloses their opportunity to move for dismissal on exhaustion

grounds. The latter argument is moot because, as noted above, the district court has ruled on petitioners' dismissal motion, filed after the order was entered, finding Tuzon failed to exhaust some claims.

Petitioners' argument that the order places government counsel in an ethical quandary is not yet ripe, as the petition only alleges that "it is possible" that the order will require government counsel to violate an adverse representation rule.

CONCLUSION

As a permissible option within its broad discretion, a district court in an appropriate case can issue a *Martinez*-style order that is reasonably tailored to the pretrial needs of the district court to assess the case. While it may be possible in some instances for a *Martinez* order to represent an abuse of discretion by the district court, that is not the case here, where the scope of the investigation and report has been limited by two screening orders and a subsequent dismissal order. In addition, Tuzon's claims of deliberate indifference and retaliation are of a type not limited to Tuzon and thus may affect other inmates. In light of the results of petitioners' investigation of Tuzon's grievance file, the district court could further conclude that, in this case, it was appropriate to create a comprehensive, substitute record. *See Martinez,* 570 F.2d at 319-20.

The district court did not clearly err in ordering petitioners to investigate the substance of Tuzon's

surviving claims and to file a report containing its findings. Because we find no clear error, we do not reach the remaining *Bauman* factors. The petition for a writ of prohibition is

DENIED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Robert V. Tuzon, Plaintiff, vs. Dennis Chewall, et al. Defendants.	No. CV-04-235-TUC-FRZ **ORDER**

A review of the record shows that this is a pro se prisoner case alleging civil rights violations, and the Court has received Answers from all the applicable Defendants.

Pursuant to LRCiv 16.2(b)(2), which governs differentiated case management, this action is designated a **prisoner pro se track** case. A meeting pursuant to Rule 26(f) of the Federal Rules of Civil Procedure is not required by Rule 26(f) in pro se prisoner cases and would be impractical. Accordingly, pursuant to Rule 16(b) of the Federal Rules of Civil Procedure:

IT IS ORDERED that:

A. If Defendants choose, defense counsel shall depose Plaintiff **on or before 12/8/06**.

B. Defendants or officials responsible for the operation of the appropriate institution are directed to undertake a **review** of the subject matter of the Complaint to:

1. Ascertain the facts and circumstances underlying the Complaint; and

2. Consider whether any action can and should be taken by the institution or other appropriate officials to resolve the subject matter of the Complaint.

C. Defendants are directed to **file a written Report with this Court on or before 1/12/07**. Defendants **shall furnish** Plaintiff a complete copy of the Report and all attachments at the time the Report is filed with the Court.

1. The Report shall include, but shall not necessarily be limited to, a thorough explanation of the actions complained of in the Complaint.

2. The Report shall state the results, if any, of the review undertaken by the officials responsible for the institution.

3. Any facts alleged in the Report shall be affirmed under oath by affidavit. **Defendants shall not base any factual allegations on unsigned affidavits.**

4. The Report shall include copies of any documents pertaining to the administrative record.

5. Copies of all affidavits, reports, other records, etc., shall be attached to the Report at the time that it is filed.

D. Because the Court is not ordering any formal pleading from Defendants, **Plaintiff is directed to *not* file a response to the Report**.

E. If Defendants submit a motion at the time they file their Report, it shall be filed as an **independent pleading, separate from the Report.**

F. If Defendants file a motion at the time they file their Report, then Plaintiff will be allowed to respond to the motion as provided in the applicable rules of civil procedure.

IT IS FURTHER ORDERED that the following deadlines shall govern this action:

A. The parties are granted until **12/22/06** for leave to move to amend pleadings or join additional parties. Thereafter, the Court will not entertain such motions unless good cause under Rule 16, Fed. R. Civ. P, is shown.

B. The parties shall submit to the Court a brief, **jointly prepared**, Settlement Status Report **by 1/25/07 and every forty-five (45) days thereafter**. The Joint Settlement Status Report shall contain no specific terms of settlement proposals. It is the responsibility of **Defendants' counsel** to initiate the communication necessary to prepare this joint filing.

C. The parties are directed to exchange their complete lists of witnesses, pursuant to Rule 26(a)(2) and (3), Fed. R. Civ. P., **on or before 2/23/07**.

D. All discovery shall be completed **on or before 3/26/07**. No discovery shall take place after that date without leave of Court upon good cause shown.

The Parties are directed to LRCiv 7.2(j), which prohibits filing discovery motions unless the parties have first met to resolve any discovery difficulties.

E. Dispositive motions shall be filed **on or before 4/24/07**.

The parties have leave of the Court, pursuant to LRCiv 7.2, to file a motion, opposition and reply. No other (supplemental) pleading will be considered by the Court, unless a motion for leave to file said pleading is granted by the Court. All pleadings submitted for the Court's review must comply with the filing, time, and form requirements of the Local Rules.

Additionally, **any** pleading which is submitted with more than one exhibit must be accompanied by a Table of Contents. The exhibits must be indexed with tabs which correspond to the Table of Contents. The Court will not consider pleadings which do not conform to these requirements.

F. The parties shall file a proposed Joint Pretrial Order **on or before** 5/25/07, which shall include, but not be limited to, that prescribed in the form of Joint Pretrial Order attached.

If dispositive motions are filed, the proposed Joint Pretrial Order shall be filed thirty (30) days from the filing date of the Court order issuing a non-dispositive decision on said motion(s).

G. It is the responsibility of **Defendants' counsel** to initiate the communication necessary to

prepare this joint filing, contact the Court for a Pretrial Conference hearing date, and file a Notice of Pretrial Conference Date at the time the Joint Pretrial Order is lodged.

H. Motions in limine **shall be filed no later than the date of filing the proposed Joint Pretrial Order**. Responses to motions in limine are due ten (10) days after the filing of the motion. No replies are permitted. Any hearing on motions in limine will be set at the Pretrial Conference for later hearing.

The Trial Date in this matter will be set at the Pretrial Conference.

IT IS FURTHER ORDERED that the following limitations shall govern discovery, unless leave of Court is granted to exceed these limitations:

A. Interrogatories are limited to twenty (20) single-part questions per side.

B. Requests for admission are limited to ten (10) per side.

C. Requests for production of documents are limited to ten (10) per side.

IT IS FURTHER ORDERED that:

A. The parties cannot, without Court approval, extend the deadlines imposed by the Court. All motions/requests for extension of time shall comply with LRCiv 7.3. All motions/requests for extension of discovery deadlines must include a summary of the discovery conducted to date, the anticipated discovery to be done if the request is

granted, and the reasons why discovery has not been completed within the deadline.

B. The parties' willful failure to comply with any of the terms of this Order may result in dismissal of this action without further notice to Plaintiff, or sanctions against Plaintiff or Defendants. *See Ferdik* v. *Bonzelet*, 963 F.2d 1258 (9th Cir. 1992).

C. Plaintiff is cautioned to comply with all applicable rules of civil procedure and Rules of Practice of the United States District Court for the District of Arizona (the Local Rules). **Pursuant to Arizona Department of Corrections Order 902 and Attachment A thereto, a copy of the Federal Rules of Civil Procedure and the Rules of Practice of the United States District Court for the District of Arizona (the Local Rules) should be "in the Reserve/Reference section of the Unit Library."**

D. Plaintiff is cautioned that his pro se status will not excuse his noncompliance with the Federal Rules of Civil Procedure and the Local Rules. *See King* v. *Atiyeh*, 814 F.2d 565 (9th Cir. 1987).

DATED this 27th day of October, 2006.

/s/ Frank R. Zapata
FRANK R. ZAPATA
United States District Judge

APPENDIX C

Rule 26. Duty to Disclose; General Provisions Governing Discovery[1]

(a) Required Disclosures.

(1) Initial Disclosures.

(A) *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information – along with the subjects of that information – that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy – or a description by category and location – of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party – who must also make available for inspection and copying as under Rule 34

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[1] The text of the Rule as amended effective December 1, 2007, is provided. As it pertains to this action, there are no material changes between this and the original.

the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) Proceedings Exempt from Initial Disclosure. The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

(ii) a forfeiture action in rem arising from a federal statute;

(iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(v) an action to enforce or quash an administrative summons or subpoena;

(vi) an action by the United States to recover benefit payments;

(vii) an action by the United States to collect on a student loan guaranteed by the United States;

(viii) a proceeding ancillary to a proceeding in another court; and

(ix) an action to enforce an arbitration award.

(C) Time for Initial Disclosures – In General. A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) Time for Initial Disclosures – For Parties Served or Joined Later. A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) Basis for Initial Disclosure; Unacceptable Excuses. A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) *Disclosure of Expert Testimony.*

(A) In General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report – prepared and signed by the witness – if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the data or other information considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) Time to Disclose Expert Testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B), within 30 days after the other party's disclosure.

(D) Supplementing the Disclosure. The parties must supplement these disclosures when required under Rule 26(e).

(3) *Pretrial Disclosures.*

(A) In General. In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and, if not previously provided, the address and telephone number of each witness – separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence – separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) *Time for Pretrial Disclosures; Objections.* Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made – except for one under Federal Rule of Evidence 402 or 403 – is waived unless excused by the court for good cause.

(4) *Form of Disclosures.*

Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

APPENDIX D

42 U.S.C. § 1997e

(a) Applicability of administrative remedies

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

(b) Failure of State to adopt or adhere to administrative grievance procedure

The failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action under section 1997a or 1997c of this title.

(c) Dismissal

(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

(2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court

may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

(d) Attorney's fees

(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 of this title, such fees shall not be awarded, except to the extent that—

(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 1988 of this title; and

(B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18 for payment of court-appointed counsel.

(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 1988 of this title.

(e) Limitation on recovery

No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

(f) Hearings

(1) To the extent practicable, in any action brought with respect to prison conditions in Federal court pursuant to section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility, pretrial proceedings in which the prisoner's participation is required or permitted shall be conducted by telephone, video conference, or other telecommunications technology without removing the prisoner from the facility in which the prisoner is confined.

(2) Subject to the agreement of the official of the Federal, State, or local unit of government with custody over the prisoner, hearings may be conducted at the facility in which the prisoner is confined. To the extent practicable, the court shall allow counsel to participate by telephone, video conference, or other

communications technology in any hearing held at the facility.

(g) Waiver of reply

(1) Any defendant may waive the right to reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility under section 1983 of this title or any other Federal law. Notwithstanding any other law or rule of procedure, such waiver shall not constitute an admission of the allegations contained in the complaint. No relief shall be granted to the plaintiff unless a reply has been filed.

(2) The court may require any defendant to reply to a complaint brought under this section if it finds that the plaintiff has a reasonable opportunity to prevail on the merits.

(h) "Prisoner" defined

As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

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(2)

No. 08-327

Supreme Court, U.S.
FILED
MAY 22 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

STATE OF ARIZONA; TERRY GODDARD, Arizona Attorney General; PAUL CARTER, Assistant Attorney General; DORA B. SCHRIRO, Director Of The Arizona Department Of Corrections,

Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA; ROBERT V. TUZON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the ruling of the Ninth Circuit Court of Appeals warrant review by this Court?

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RULES AND STATUTES INVOLVED

In addition to the rule and statute appended to Petitioners' Petition for Writ of Certiorari, the following rules and statutory provisions are relevant to the Court's decision:

Rule 16(a), (b) and (c), Fed. R. Civ. P.:

(a) Purposes of a Pretrial Conference. In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:

(1) expediting disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation; and

(5) facilitating settlement.

(b) Scheduling.

(1) Scheduling Order. Except in categories of actions exempted by local rule, the district judge – or a magistrate judge when authorized by local rule – must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference or by telephone, mail, or other means.

(2) Time to Issue. The judge must issue the scheduling order as soon as practicable, but in any event within the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared.

(3) Contents of the Order.

(A) Required Contents. The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.

(B) Permitted Contents. The scheduling order may:

(i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);

(ii) modify the extent of discovery;

(iii) provide for disclosure or discovery of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced;

(v) set dates for pretrial conferences and for trial; and

(vi) include other appropriate matters.

(4) Modifying a Schedule. A schedule may be modified only for good cause and with the judge's consent.

(c) Attendance and Matters for Consideration at a Pretrial Conference.

(1) Attendance. A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement.

(2) Matters for Consideration. At any pretrial conference, the court may consider and take appropriate action on the following matters:

(A) formulating and simplifying the issues, and eliminating frivolous claims or defenses;

(B) amending the pleadings if necessary or desirable;

(C) obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence;

(D) avoiding unnecessary proof and cumulative evidence, and limiting the use of testimony under Federal Rule of Evidence 702;

(E) determining the appropriateness and timing of summary adjudication under Rule 56;

(F) controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37;

(G) identifying witnesses and documents, scheduling the filing and exchange of any pretrial briefs, and setting dates for further conferences and for trial;

(H) referring matters to a magistrate judge or a master;

(I) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule;

(J) determining the form and content of the pretrial order;

(K) disposing of pending motions;

(L) adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(M) ordering a separate trial under Rule 42(b) of a claim, counterclaim, crossclaim, third-party claim, or particular issue;

(N) ordering the presentation of evidence early in the trial on a manageable issue that might, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);

(O) establishing a reasonable limit on the time allowed to present evidence; and

(P) facilitating in other ways the just, speedy, and inexpensive disposition of the action.

Rule 83(b), Fed. R. Civ. P.:

(b) Procedure When There Is No Controlling Law. A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and the district's local rules. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

28 U.S.C. § 1915A(a) and (b):

(a) Screening. – The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil

action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

(b) Grounds for dismissal. – On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint –

(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or

(2) seeks monetary relief from a defendant who is immune from such relief.

STATEMENT OF THE CASE

The question presented in this case is particularly undeserving of this Court's review. The scheduling order Petitioners seek to have reviewed and prohibited is simply not an issue worthy of this Court's attention: it is axiomatic that district courts have broad discretion to issue scheduling orders reasonably tailored to the pretrial needs of the district court to assess a particular type of case.

A. Factual Background

When *pro se* prisoners file 42 U.S.C. § 1983 ("Section 1983") actions against penal institutions, their officers, employees and/or agents, the Tucson

division[1] of the District Court of Arizona sometimes issues a scheduling order (hereinafter the "Scheduling Order") which serves as an important case management tool for the district judge or magistrate judge assigned to the matter. The Scheduling Order generally requires defendants to review the subject matter of the complaint in order to ascertain the facts and circumstances underlying the complaint, and to consider whether any action can and should be taken by the institution or other appropriate officials to resolve the subject matter of the complaint.

The Scheduling Order also requires defendants to file a written report with the district court, which includes: an explanation of the actions described in the complaint; the results, if any, of the review undertaken by officials responsible for the institution; affidavits to support any facts alleged in the report; and copies of any documents pertaining to the administrative record. This process is particularly useful to the district and magistrate judges and their clerks when *pro se* prisoners allege that they are

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[1] The Phoenix division does not utilize the scheduling orders at issue in this matter. Petitioners attempt to demonstrate that this is a District-wide practice by citing orders from Phoenix division district judges, in which those judges deny state defendants' appeals from similar magistrate judge-issued scheduling orders. (Pet. Brief at 6). However, the magistrate judges who issued those scheduling orders all are from the Tucson division.

currently being denied medical treatment.[2] Information derived from defendants' investigation and reports can assist the district court in determining whether a prisoner is at risk of physical harm that could be prevented or alleviated by judicial intervention. Of course, the Scheduling Order also sets various deadlines for discovery and motion practice.

Rule 16(b), Fed. R. Civ. P. permits the Scheduling Order at issue by facilitating the various case management considerations specifically enumerated in Rule 16(a)-(c). Moreover, pursuant to Rule 83(b), district courts have the discretion to manage civil cases in any manner as long as it is consistent with federal law. *See* Fed. R. Civ. P. 83(b) ("A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and local rules of the district.").

The Scheduling Order serves a variety of practical purposes with regard to the district court's evaluation and management of *pro se* prisoner cases. It is intended to give the district court a broader, more substantive overview of the case such that it may consider the numerous case management factors specified in Rule 16. *See* Fed. R. Civ. P. 16(a),(b),(c). As

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[2] In the case at bar, the plaintiff-prisoner asserted a claim for inadequate medical treatment before the district court issued a Scheduling Order. However, the district court eventually dismissed the medical treatment claim before the report required by the Scheduling Order was due to be filed.

such, the report requirement facilitates the numerous Rule 16 considerations of case management, which are particularly important in *pro se* prisoner cases. Such reports provide necessary information to the district court that allows it to issue subsequent orders appropriately managing the case by altering deadlines, holding conferences, requiring early dispositive motions, obtaining stipulations, and taking other appropriate actions to manage the pretrial stage of litigation.

Because the Tucson division's docket is heavily weighted with criminal cases as opposed to civil cases, Tucson division district judges and magistrate judges rarely have the opportunity or need to issue these Scheduling Orders. As reflected in the court's Electronic Case Filing system, during the years 2006 and 2007 (the time period relevant to this case), the Tucson division district judges issued a total of eighteen *pro se* prisoner scheduling orders. Of those, only five contained language similar to the scheduling order at issue in this case (i.e., language requiring defendants to conduct an investigation and file a report). In fact, among cases filed by *pro se* prisoner litigants during the years 2006, 2007 and 2008, the Tucson division district judges and magistrate judges issued only thirteen Scheduling Orders similar to the one at issue in this case.

Consistent with these statistics, very few *pro se* prisoner scheduling orders are issued each year because many *pro se* prisoner cases are screened and dismissed before active litigation (as required of

district court judges pursuant to the Prison Litigation Reform Act, specifically 42 U.S.C. § 1997e and 29 U.S.C. § 1915A). Also, the type of scheduling order issued varies by judge depending on the facts of the case and the individual judge's discretion. As a result, even including Tuzon's case in the above tallies, an average of fewer than five Scheduling Orders per year were issued between 2006 and 2008.

B. Proceedings Below

On May 6, 2004, prisoner Robert Tuzon filed a complaint in the Tucson division of the District Court of Arizona, seeking relief under Section 1983. (Dkt. 1). On March 1, 2005, the District Court screened the complaint, granted Tuzon *in forma pauperis* status and directed that the complaint be served. (Dkt. 5). On January 17, 2006, Tuzon filed an amended complaint alleging damages in connection with an attack on Tuzon by other inmates, confiscation of Tuzon's legal documents by prison library staff, confiscation of Tuzon's money, and inadequate medical treatment. (Dkt. 16). On April 3, 2006, after screening the amended complaint, the district court dismissed certain claims and defendants without prejudice, and directed the remaining defendants to file answers to the remaining claims. (Dkt. 18).

After all answers were filed, the district court entered the Scheduling Order at issue on October 30, 2006. (Pet. App. B; Scheduling Order, Dkt. 43). Petitioners' response to the Scheduling Order was

due on January 12, 2007, but on November 6, 2006, Petitioners filed a Motion for Reconsideration regarding the issuance of the Scheduling Order, which the district court eventually denied. (Dkt. 44; Dkt. 48). Petitioners then filed a Motion to Stay enforcement of the Scheduling Order pending appeal, which the district court granted. (Dkt. 56; Dkt. 76).

On January 10, 2007, Petitioners filed a motion to dismiss all of Tuzon's claims, on the grounds that Tuzon had failed to exhaust his available administrative grievance procedures before filing suit. (Dkt. 55). In particular, as to Count I of the Amended Complaint, Petitioners initially argued that Tuzon submitted no inmate letter or grievance. *Id.* When Tuzon attached copies of his inmate letter, grievance, and appeal to the Director as exhibits to his response, Petitioners "conducted an investigation and now assert that Tuzon's grievance documents are genuine and that he submitted the documents to security officers assigned to his housing unit, but the documents were not forwarded to . . . [the] Grievance Coordinator." (Dkt. 76, at p. 4).

In addition, Petitioners initially alleged that Tuzon had not exhausted his remedies with regard to his allegation that he was denied eyeglasses, but Petitioners subsequently "acknowledge[d] that the grievance was filed under the wrong number and that the grievance log entry notes 'whole file missing.'" *Id.* at 10. On July 27, 2007, the district court granted in part and denied in part the motion to dismiss. *Id.*

Petitioners petitioned the Ninth Circuit for a writ of prohibition, pursuant to 28 U.S.C. § 1651(a), to prohibit the district court from enforcing portions of the Scheduling Order. In a *per curiam* opinion by Chief Judge Alex Kozinski and Circuit Judges Ronald Gould and Consuelo Callahan, the Ninth Circuit denied Petitioners' Petition for Writ of Prohibition, holding that the district court's issuance of the Scheduling Order was not clear error and that the Scheduling Order was indeed a permissible case assessment tool. The Ninth Circuit went on to note that due to the bungling of Petitioners' investigation of Tuzon's grievance file, the district court could have additionally concluded that, in this specific case, the Scheduling Order was appropriately used to create a comprehensive, substitute record. *In re Arizona*, 528 F.3d 652 (9th Cir. 2008).

REASONS FOR DENYING PETITION

Several grounds for denying the Petition are discussed below. Included in that discussion, pursuant to Supreme Court Rule 15, Petitioners' misstatements of fact and law are identified and addressed as they arise.

I. PETITIONERS' PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS HAVE RAISED NO ISSUE APPROPRIATE FOR A GRANT OF CERTIORARI.

A. There Is Conformity Among the Circuits – Not a Circuit Split – In Approving the Use of Orders Similar to the Scheduling Order at Issue Here.

Petitioners do not attempt to argue, and could not argue, that another U.S. court of appeals has entered a decision in conflict with the Ninth Circuit's decision below. In fact, for more than thirty years, the Fifth and Tenth Circuits have explicitly recognized the utility of the type of reports required by the Scheduling Order (often called *Martinez* reports) and further affirmed the district courts' authority to request such reports. *See Martinez v. Aaron*, 570 F.2d 317 (10th Cir.1978) (*per curiam*); *Norton v. Dimazana*, 122 F.3d 286, 292 (5th Cir.1997); *Hardwick v. Ault*, 517 F.2d 295, 298 (5th Cir.1975).

Because there is complete uniformity among the circuit courts addressing the issue presented here, the Court should deny review of this matter.

B. The Scheduling Order Does Not Conflict with the U.S. Constitution, Federal Statutes or Any Applicable Decisions of this Court.

Petitioners go to great lengths and are admittedly imaginative in their attempts to create a

conflict between the Scheduling Order's provisions and the Constitution, federal statutes or this Court's previous rulings. However, there is simply no substance to Petitioners' arguments as no such conflict exists.

1. Neither Petitioners' due process rights nor separation of powers principles are implicated by the Scheduling Order.

Petitioners make wholly unsupported, generalized allegations that the Scheduling Order somehow violates their constitutional due process rights or violates basic separation of powers principles.

a. Due process

Petitioners essentially claim that they have a liberty or property interest in the Federal Rules of Civil Procedure, and that the Scheduling Order flouts those rules by requiring disclosures in excess of those designated in Rule 26, Fed. R. Civ. P. Yet, Petitioners do not cite *any* case law to support that novel and peculiar argument. (Pet. Brief at p. 17-19). No constitutional due process issue exists here, despite Petitioners' specious attempts to create one.

b. Separation of powers

Petitioners claim that the Scheduling Order violates separation of powers and federalism principles

by "co-opting" members of the executive branch and requiring them to conduct an investigation. (Pet. Brief at p. 13-14). Applying Petitioners' flawed logic, each time a state governmental entity is a party to litigation, federalism and separation of powers principals would render the district court powerless to issue any number of case management and discovery orders.

Citing a handful of Supreme Court cases that purport to "[caution] the federal courts to stay out of the day-to-day administration of state prisons," Petitioners next claim that the Scheduling Order's requirements are both in conflict with the Constitution and this Court's previous rulings. (Pet. Brief at p. 14-17). But the cases cited by Petitioners involve lower courts entering judgments and/or granting injunctive relief with regard to prison administration and policies after an injury to inmates has been established. *See Procunier v. Martinez*, 416 U.S. 396 (1974), *overruled on other grounds*; *Lewis v. Casey*, 518 U.S. 343 (1996). For example, in *Procunier*, the district court enjoined enforcement of certain prison regulations on prison mail censorship, which the district court found to unconstitutionally limit the inmates' freedom of speech. *Procunier*, 416 U.S. 396. Notably, in that case, this Court affirmed the district court's intervention. *Id.*

In *Lewis*, the district court, after finding injury to inmates, entered an order "mandating detailed, systemwide changes" in a state's prison law libraries and legal assistance programs. *Lewis*, 518 U.S. at

343. This Court found that the district court "failed to accord adequate deference to the judgment of the prison authorities" in significant respects, including its determination justifying the state prison's restrictions on lockdown prisoners' access to law libraries. *Id.* at 361-62.

In stark contrast to the cases cited by Petitioners, the Scheduling Order at issue here is not a judgment, provides no injunctive relief and cannot be characterized as interfering with daily prison operations and regulations of the kind discussed in *Procunier* and *Lewis*. The Scheduling Order merely requires defendants to investigate complaints and produce information to the district court as part of a pending Section 1983 civil rights action. Thus, the cited cases are completely inapplicable to the issue before the Court.

Again, Petitioners' arguments are illogical and founded both in misstatements of constitutional law and misapplication of this Court's previous rulings. Petitioners have therefore failed to identify any constitutional issue or conflict with Supreme Court precedence that could warrant review of the propriety of the Scheduling Order in this matter.

2. The Scheduling Order is not in conflict with any federal statute.

a. Rules Enabling Act (REA)

Petitioners erroneously argue that the Scheduling Order violates the Rules Enabling Act because

it conflicts with Fed. R. Civ. P. Rule 26(a)(1)'s exemption for service of disclosure statements in *pro se* prisoner litigation. *See* Rule 26(a)(1)(B)(iv), Fed. R. Civ. P.[3] The Scheduling Order, however, does not conflict in any way with Rule 26(a)(1) because it does not require Petitioners to produce Rule 26(a)(1) disclosures. Moreover, Rule 26(a)(1) disclosure statements are not filed with the district court and instead are transmitted only to the other parties to a given action. In contrast, the information required by the Scheduling Order must be provided directly to the district court, with a copy to the plaintiff/prisoner.

The information submitted to the district court pursuant to the Scheduling Order further cannot be classified as a disclosure statement because the purpose of the information is to serve as an important case management tool for the district judge or magistrate judge assigned to the matter. Armed with a broader, more substantive overview of the case, the district court may then consider the numerous case management factors specified in Rule 16. *See* Fed. R. Civ. P. 16(a),(b),(c).

Though Petitioners, tellingly, do not reference Rule 16 in their Petition, Rule 16 authorizes the

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[3] Petitioners' Petition for Writ of Certiorari, and documents filed in the courts below, reference the exemption as subsection (E)(iv) of Rule 26(a)(1), but that subsection was renumbered to (B)(iv) when the Federal Rules of Civil Procedure were revised effective January 1, 2009. The text of the subsection at issue was not otherwise altered.

issuance of this type of Scheduling Order. *See* Rule 16(b)(3)(B)(vi), Fed. R. Civ. P.[4] (scheduling order may "include other appropriate matters"). Rule 83(b) further provides that district courts have the discretion to manage civil cases in any manner as long as it is consistent with federal law. Because the Federal Rules of Civil Procedure effectively authorize the Scheduling Order, such orders do not violate the Rules Enabling Act, and Petitioners have failed to demonstrate a conflict between the Scheduling Order and federal law.

Petitioners also argue that the Scheduling Order overreaches by improperly and unfairly requiring non-parties to investigate the plaintiff's complaint. (Pet. Brief at p. 13, 16, 18). This argument ignores the everyday realities of civil litigation. Under Petitioners' logic, each time an entity is a party to civil litigation, a district court would not have the authority to enforce any rules or orders that would require action by individuals employed by or associated with the entity, but not named as parties. It is axiomatic that when a business is sued for anything from employment discrimination to patent infringement, non-parties such as human resources

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[4] The pleadings Petitioners and the district court filed in the proceedings below reference the Rule 16 provision as Rule 16(b)(8), but that subsection was renumbered to 16(b)(3)(B)(vi) when the Federal Rules of Civil Procedure were revised effective January 1, 2009. The text of the subsection at issue was not substantially altered. Rule 16(b)(8) previously read "any other matters appropriate in the circumstances of the case."

representatives and engineers must assist in preparing documents and responses to any number of litigation-related items. A district court may order, or the Federal Rules of Civil Procedure may require, that parties respond to discovery requests or produce pre-trial statements, and just because the individuals contributing to those documents are not named as parties does not alleviate the entity's obligation to comply with the rules and court orders.

b. Prison Litigation Reform Act (PLRA)

Petitioners substantially misstate the law, as well as the facts of the current case, by arguing that the Scheduling Order abrogates or is inconsistent with the PLRA's administrative exhaustion requirement. *See* 42 U.S.C. § 1997. The Scheduling Order does not in any way hinder – let alone bar – defendants in a Section 1983 prisoner suit from seeking dismissal based on a prisoner's failure to exhaust administrative remedies, as specifically authorized by the PLRA. Nor does the order give any prisoner an "unauthorized second chance" to "seek prison review of his grievances." (Pet. Brief at p. 12). Indeed, defendants named in such lawsuits are free to file dispositive motions prior to answering the complaint or before fulfilling the Scheduling Order, asserting that the plaintiff-prisoner failed to exhaust administrative remedies prior to suit. If such a dispositive motion is successful, no Scheduling Order would issue, or if one had already issued, then those

successful defendants certainly would not need to prepare a "*Martinez* report."

In the case at bar, the defendants elected to answer the complaint before filing a dispositive motion. Consequently, the Scheduling Order issued and the defendants later filed a motion to dismiss based on Tuzon's alleged failure to exhaust his administrative remedies. The district court partially granted that motion and dismissed some of Tuzon's claims based on the PLRA's exhaustion requirement; thus, defendants did not have to investigate or provide a report regarding those claims which Tuzon had failed to grieve within the penal system. However, as discussed above, the district court denied the motion to dismiss in part because the motion practice revealed that defendants had misplaced Tuzon's other grievance filings. The Petition conveniently omits this fact, which related directly to the PLRA's administrative exhaustion requirement and the Petitioners' substantial and admitted mishandling of some of Tuzon's grievances.

Petitioners' argument on this issue not only misstates the facts and the law, but also is intellectually dishonest. Petitioners made a similar (albeit unsuccessful) argument below regarding the Scheduling Order's purportedly adverse effect on Petitioners' ability to assert a qualified immunity defense in a dispositive motion. The Ninth Circuit chastised Petitioners for their faulty reasoning, stating "it is factually inaccurate to allege that the [scheduling] order, rather than petitioners' trial strategy,

forecloses the benefits of their immunity defense." *In re Arizona*, 528 F.3d 652, 659 (9th Cir. 2008). It is likewise factually inaccurate for Petitioners to claim that the Scheduling Order limits or precludes their rights under the PLRA.

C. The Ninth Circuit Has Not Decided an Important Question of Federal Law that Should be Settled by This Court.

As discussed above, the Scheduling Order's provisions do not conflict with any constitutional provision or federal statute. A district court's discretion to issue a scheduling order and weigh case management issues is simply not an issue that warrants the attention of this Court.

II. BECAUSE THE SCHEDULING ORDERS ARE ISSUED IN FEWER THAN FIVE *PRO SE* PRISONER CASES PER YEAR, THE QUESTION PETITIONERS WANT ADDRESSED WILL RARELY ARISE.

The infrequent manner in which these scheduling orders are issued provides still more grounds for denying the Petition. As set forth above, only magistrate judges and district judges in the Tucson division of the District Court of Arizona utilize the scheduling orders in select *pro se* prisoner litigation matters. In fact, in 2006, 2007 and 2008 combined, the Tucson division issued only thirteen scheduling orders similar to the one at issue in this case.

Including Tuzon's case, on average, fewer than five scheduling orders are issued each year. Because the question Petitioners want the Court to address will so rarely arise, a writ of certiorari is not appropriate in this case.

III. THE PETITION SHOULD BE DENIED BECAUSE THE NINTH CIRCUIT CORRECTLY RULED THAT THE SCHEDULING ORDER WAS NOT CLEAR ERROR.

Though the Court has no reason to consider the issues raised in the lower court decisions, further grounds for denial of review lie in the fact that the Ninth Circuit's position – that the Scheduling Order was not clear error and a writ of prohibition should not issue – is correct.

The Ninth Circuit held that the Scheduling Order requiring the Petitioners to produce a report to the district court was warranted under the circumstances of the case. *In re Arizona*, 528 F.3d 652. The Ninth Circuit approved of the Scheduling Order, and its attendant "*Martinez* report" requirement, on several grounds.

First, the court recognized that Rule 16 "vests the district court with early control over cases 'toward a process of judicial management that embraces the entire pretrial phase, especially motions and discovery.'" *Id.* at 657 (citing Rule 16(a), Fed. R. Civ. P.). Second, the Ninth Circuit held that the Scheduling Order was a proper exercise of the district court's

discretion to control discovery in Section 1983 *pro se* prisoner actions, especially in this case when utilized after the district court "identified defects in the administrative record," based on Petitioners' mishandling of Tuzon's grievances. *Id.* at 658. At the point when the district court discovered that defect, a *Martinez* report was necessary to determine whether the case involved "an important complicated constitutional issue" affecting additional prisoners. *Id.*

The Ninth Circuit also properly refuted Petitioners' argument that the Scheduling Order constituted impermissible injunctive relief. The court reasoned that Petitioners made no showing that the order's requirements interfered with daily prison administration, as was the concern in *Lewis v. Casey*. 528 F.3d at 658. The Ninth Circuit declined to speculate further on this issue because Petitioners provided "no information about the amount or kind of additional work" the Petitioners and non-parties would have to perform "in order to comply with the terms of the order, as opposed to the amount and kind of work they would ordinarily perform for any other prisoner lawsuit or the work they have already performed for this case." *Id.*

The Ninth Circuit also found no merit in Petitioners' arguments that the Scheduling Order denied them the use of a qualified immunity defense, or that the order could require government counsel to violate ethical rules regarding adverse representation. Because the Ninth Circuit's decision is correct, the Petition should be denied.

Finally, certiorari rarely should be granted when the error alleged by a petitioner "consists of erroneous factual findings or the misapplication of a properly stated rule of law." Supreme Court Rule 10. In this case, even if Petitioners could demonstrate that the Ninth Circuit misapplied the rule of law by finding that the Scheduling Order was not clear error, certiorari would still be inappropriate because the Ninth Circuit properly stated the rule of law, i.e., the standard for issuance of a writ of prohibition.

CONCLUSION

Petitioners' Petition for Writ of Certiorari should be denied because Petitioners have raised no issue appropriate for a grant of certiorari.

Respectfully submitted,

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United States District Court
for the District of Arizona

Dated: May 22, 2009

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(3)

No. 08-327

Supreme Court, U.S.
FILED
JUN 15 2009
OFFICE OF THE CLERK

In The Supreme Court of the United States

STATE OF ARIZONA; TERRY GODDARD, Arizona Attorney General; PAUL CARTER, Assistant Attorney General; CHARLES L. RYAN, Director Of The Arizona Department Of Corrections,

Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA; ROBERT V. TUZON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

After the Petition for Certiorari was filed, Charles L. Ryan replaced Dora Schriro as Director of the Arizona Department of Corrections. The other parties remain the same.

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ARGUMENT

The District Court's main theme in opposing certiorari seems to be that the super-disclosure reports that it requires Arizona prison officials to provide in certain inmates' cases are helpful to the court. But their utility to the court does not legitimize them. The issue is whether the court had lawful authority to force state executive-branch officials – who are not even parties to the suit – to stop performing the responsibility that Arizona law imposes on them, in order to act as investigators for a federal court, looking into allegations made by prison inmates, a group known to often use litigation for recreation instead of legitimate means. The District Court accuses the Petitioners of misleading this Court (which it fails to prove), but it fails to show how it has the power to draft non-party Arizona prison officials into service as its own investigative service.

I. The Court Should Grant Certiorari to Reassert Its Authority and Supremacy in Promulgating Federal Rules of Procedure.

As the Petitioners pointed out, this Court has, with Congressional approval, decreed that disclosure statements shall not be required in civil suits brought by inmates representing themselves. Fed. R. Civ. P. 26(a)(1)(E)(iv). The District Court asserts that its super-disclosure orders do not violate that edict because the required reports, unlike typical disclosure statements, must be attested and filed with the judge, and the judge uses them as a case-management tool.

(Resp. at 17.) Essentially, the District Court's position is that it can ignore this Court's edict in Rule 26(a)(1)(E)(iv) by tweaking the details and requiring a statement that is, in some respects, *more onerous* than a Rule 26 disclosure statement would be. That is an unlikely interpretation of Rule 26(a)(1)(E)(iv) and does not even begin to address the unfairness inherent in imposing this super-disclosure requirement unilaterally. If this Court had intended to grant the district courts the extraordinary power to unilaterally require the defense – and associated non-parties – to go beyond Rule 26's requirements, it likely would have expressed this intent explicitly, rather than leaving it to be discerned by negative implication.

The District Court looks in vain to Rule 16 to support its super-disclosure statements. Rule 16 is a timing rule. It does not establish or authorize any procedures for conducting litigation. Rather, it requires the district courts to establish schedules for procedures established by other rules. Thus, the fact that scheduling orders may "include other appropriate matters" does not give the district courts carte blanche to create new procedures. The option of including other appropriate matters in a scheduling order simply does not authorize a court to unilaterally require one side to disclose things to the other side, does not allow the court to co-opt the resources of a state government's executive branch, and does not allow the court to impose requirements

against officials over whom it lacks jurisdiction. The District Court asks far too much of this rule.

II. The Court Should Grant Certiorari to Clarify the Role of Administrative Exhaustion Under the Prison Litigation Reform Act.

The District Court misstates the Petitioners' arguments concerning the PLRA. Contrary to the District Court's assertions (Resp. at 19-20), the Petitioners did not argue that the super-disclosure orders hinder or bar them from seeking dismissal based on the inmates' failure to exhaust their administrative remedies. Rather, they noted the super-disclosure orders' inconsistency with the PLRA: the super-disclosure order requires prison officials to conduct an investigation of the inmates' claims even though the inmate might have forfeited that opportunity by not properly pursuing a prison grievance.

Although prison officials could avoid that result by filing an early motion to dismiss raising the inmates' failure to exhaust, the District Court lacks the authority to require it. The District Court articulates no reason why inmates' lawsuits should require defendant prison officials to so quickly garner their resources – and the resources of their superiors and institutions – to file the dispositive motion. The mere fact that by doing so they could avoid doing an investigation that the inmate has already forfeited

does not give the District Court authority to make them do so.[1]

III. The Court Should Grant Certiorari to Establish the Limits of the District Courts' Powers Under the Separation of Powers and Principles of Federalism.

The super-disclosure order crosses both the line separating the federal from the state governments and the line separating the judicial from the executive branch. The District Court cites no authority allowing such a usurpation of the resources of Arizona's Department of Corrections (ADC). It thus tacitly concedes that there is no authority for it to co-opt the services of a different branch of a different level of government.

The District Court's first argument is unconvincing. It asserts that adopting the Petitioners'

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[1] The District Court accuses ADC of having bungled Tuzon's administrative grievances, and it insinuates that this supports the issuance of the Order at issue here. (Resp. at 12 [citing *In re Arizona*, 528 F.3d 652 (9th Cir. 2008)]; *id.* at 20.) Even if ADC were responsible for the mix-up, this accusation is out of place because it was not the reason why the District Court issued the super-disclosure order. The super-disclosure order was issued on October 30, 2006 (Pet. App. D), long before the District Court addressed the grievance mix-up, which it did on July 7, 2007 (Dkt. 76). And the mix-up in Tuzon's case could not possibly justify the District Court in entering substantially the same order in other cases.

position would mean that "each time a state governmental entity is a party to litigation, federalism and separation of powers principals would render the district court powerless to issue any number of case management and discovery orders." (Resp. at 15.) This ignores the salient fact: neither ADC nor the State of Arizona is a party to the case. And even if they were, this would only give the court the power to enter *appropriate* case-management and discovery orders, ones that are neutral and bilateral. The Order at issue here is neither neutral nor bilateral, and it is not appropriate. It improperly co-opts ADC into the court's investigative arm for Tuzon's and other inmates' lawsuits.

The District Court also relies on cases where this Court has approved orders entered against state prison officials, and by extension, state prisons: *Lewis v. Casey*, 518 U.S. 343 (1996), and *Procunier v. Martinez*, 416 U.S. 396 (1974), *overruled on other grounds by Lewis v. Casey*. Rather than supporting the court's argument, these cases illustrate the Petitioners' position. In both, the courts entered orders granting injunctive relief that were appropriate because the plaintiffs had proven the alleged constitutional violations. In neither case did the court co-opt state prison officials into a judicial investigative role. In neither did the court require prison officials to, at taxpayer expense, investigate the plaintiffs' cases for them and report back to them. These cases simply do not support the District Court.

The District Court asserts that, in contrast to the injunctions in *Lewis* and *Procunier*, its super-disclosure "is not a judgment, provides no injunctive relief and cannot be characterized as interfering with daily prison operations and regulations of the kind discussed in *Procunier* and *Lewis*." (Resp. at 16.) Whatever truth there is in that statement is irrelevant. A court's order requiring certain people to do certain things under pain of contempt is just as onerous whether called a "scheduling order" or a "judgment." While the super-disclosure order might not be *called* an injunction, it does grant some injunctive-type prospective relief to Tuzon by forcing prison officials to investigate his allegations and provide him a verified report. *Cf.* 18 U.S.C. § 3626(g)(7) (defining "prospective relief"); *In re Arizona*, 528 F.3d at 658 (acknowledging that the super-disclosure order constitutes prospective relief).

Both the District Court and the Ninth Circuit refuse to acknowledge that the super-disclosure order interferes with Arizona prison officials in the performance of their statutory duties to run the state prisons. (Resp. at 16; *In re Arizona*, 528 F.3d at 658 [refusing to even consider the interference].) That interference is clear on the face of the Order, which is specifically directed at "Defendants *or officials responsible for the operation of the appropriate institution*" and requires them "to undertake a **review** of the subject matter of the Complaint." (Pet. at 1b-2b [italics added].) Neither the District Court nor the Ninth Circuit offers any explanation for how this

review could be carried out and the report produced without requiring prison officials to divert resources away from the day-to-day operations of the prisons. ADC does not have such a surfeit of resources and manpower that it can comply with the District Court's super-disclosure orders without taking prison officials and employees away from their day-to-day duties. Federal-court interference with the running of state prisons is manifest in the Order, even if the lower courts refuse to acknowledge it.

IV. The Court Should Grant Certiorari to Give Guidance to the Lower Courts to Protect the Due-Process Rights of Parties and Non-Parties.

The District Court misstates the Petitioners' position on the due-process implications of its super-disclosure order. Contrary to the court's assertion, the Petitioners' do not assert that they have a liberty interest in the Federal Rules of Civil Procedure. Their two-part argument is much more basic. First, courts must have personal jurisdiction over persons against whom they purport to act. And second, even when they do have that jurisdiction, they must treat both sides fairly and neutrally. The super-disclosure orders fail in both respects.

A. The Court should address the due-process implications of the District Court's actions against non-parties.

A court's first responsibility in deciding whether to act is to determine whether it has jurisdiction – whether it has power to take the contemplated action. *Lance v. Coffman*, 549 U.S. 437, 439 (2007). Part of this examination is whether the court has personal jurisdiction over the parties over whom it purports to act. *See Dennis Garberg & Assocs. v. Pack-Tech,* 115 F.3d 767, 771-72 (10th Cir. 1997) (before entering judgment against defaulting party, court must determine whether it has personal jurisdiction). Courts surely must conduct the inquiry if there is any reasonable doubt about their jurisdiction. *See Ashcroft v. Iqbal*, 556 U.S. ___, ___, No. 07-1015, slip op. at 6 (May 18, 2009) (courts must address their subject-matter jurisdiction whenever it is fairly in doubt).

The District Court ignores the fact that it has ordered non-parties – under penalty of contempt – to undertake the mandated judicial investigation. It accuses the Petitioners of "ignor[ing] the everyday realities of modern litigation" when "an entity is a party to civil litigation." (Resp. at 18.) The District Court goes on: "It is axiomatic that when a business is sued for anything from employment discrimination to patent infringement, non-parties such as human resources representatives and engineers must assist in preparing documents and responses to any number of litigation-related items." (*Id.* at 18-19.) This

statement is true: when a principal is sued, its agents may be required to take actions to fulfill the principal's litigation responsibilities. After all, a corporate entity can only act through its agents. But the District Court persistently ignores the fact that the entity, the Arizona Department of Corrections, is *not* a party to this litigation. The Defendants are agents of ADC, not vice-versa. Water flows downstream, not up. The District Court cites no authority supporting the notion that hauling an agent into court effectively brings in the agent's principal. It cites no authority giving it the power to co-opt non-parties to undertake a judicial investigation of cases before it.

"Personal jurisdiction . . . 'represents a restriction on judicial power . . . as a matter of individual liberty.'" *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999) (quoting *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982)). "The requirement that a court have personal jurisdiction flows . . . from the Due Process Clause." *Id.* (quoting *Ins. Corp. of Ireland*, 456 U.S. at 702). The super-disclosure orders violate the due-process rights of the non-party institutions and persons to whom the district court purports to apply them.

B. The Court should address the due-process implications of the District Court's failure to be fair and neutral.

The District Court also ignores the unfairness of its super-disclosure orders. American courts are

adversarial, not inquisitional. The judge sits as a neutral arbiter, favoring neither one side nor the other. "[T]he Due Process Clause entitles a person to an impartial and disinterested tribunal," *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison,* 349 U.S. 133, 136 (1955).

The super-disclosure orders require the defense (and associated non-parties) to investigate, report, and take possible action on behalf of the court. The orders require absolutely nothing of the inmate-plaintiffs. Even if some rule allowed courts to mandate investigations of the type at issue here, they would have to impose *mutual* obligations.

Courts generally allow the parties themselves to investigate and prove their respective cases. They do not provide one side free assistance in investigating and proving their case, and they certainly do not do so at the opposing party's expense, both financially and in manpower. This is fair and neutral. It is part of the American adversarial system of justice. *See McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2 (1991) (contrasting adversarial versus inquisitorial systems). If Tuzon had sued a business corporation, it is hard to conceive of the District Court ordering the corporation to investigate his claims and prepare a report for the court and Tuzon to use. The State of Arizona and its Department of Corrections are entitled to the same respect.

The District Court asserts that it issues the super-disclosure orders in cases involving ongoing medical issues, which it uses to determine whether the "prisoner is at risk of physical harm that could be prevented or alleviated by judicial intervention." (Resp. at 8.) This does not justify the super-disclosure order, certainly not in this case. Tuzon's only claims that might qualify were the allegation that Defendant Taylor had denied him food while he was on detention status (Dkt. 76 at 2), and that Defendant Chenail had denied him prescription eyeglasses (*id.* at 3). The former was not an ongoing violation – Tuzon did not allege that he was currently being denied food – and the latter could hardly be deemed as putting Tuzon at risk of physical harm. Furthermore, the court did not limit its super-disclosure order to the medical issues; it ordered the defense to investigate and report on *all* of Tuzon's non-dismissed claims.

Tuzon did not allege that he was in any present danger of physical harm. (Dkt. 16, passim.) The District Court does not explain why it should – in the limited class of cases in which it says it issues these orders (Resp. at 6-8) – reach out to search for claims of possible physical harm against inmates when the inmates themselves have not alleged continuing physical danger. Inmates can surely be expected to bring such matters to the court's attention. The District Court does not have the authority to order ADC to perform the inmates' investigations for them.

V. This Is an Important Issue that the Court Should Not Ignore.

The District Court's efforts to downplay the importance of the issues presented here are unconvincing. As the District Court notes, it has recently averaged five of these super-disclosure orders per year. (Resp. at 9-10.) Its Response suggests that it plans to continue issuing them. It promises, in essence, to continue to violate the rights of the Petitioners and associated prison personnel, and will do so some *fifty* times over the next ten years, assuming that the historic rate holds true. That is hardly insignificant.

Similarly, the fact that there is no circuit split on this and similar[2] issues is no reason for the Court to ignore the problem. Rather, cases like *Martinez* show that the problem is more widespread than the District Court would have it. In any event, the lack of a circuit split does not mean that there is no need for this Court to clarify the law. *Cf. Caperton v. A.T. Massey Coal Co.*, 556 U.S. ___, ___, No. 08-22 slip op. at 39 (June 8, 2009) (Scalia, J., dissenting) ("The principal purpose of this Court's exercise of its certiorari jurisdiction is to clarify the law.").

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[2] The so-called *Martinez* reports perform a different function than the super-disclosure report at issue here. The district courts that order *Martinez* reports turn prison officials into their judicial investigators to provide information that the latter use "to enable the trial court to decide the jurisdictional issues and make a determination under [the screening provision of the PLRA]." *Martinez v. Aaron*, 570 F.2d 317, 319 (10th Cir. 1978).

That the Ninth Circuit has chosen to overlook the District Court's violations of the Petitioners' rights should not persuade this Court to do the same. As overseer of the federal judiciary, this Court should clarify the limits on the lower courts' ability to issue scheduling orders that conflict with the Federal Rules of Civil Procedure, the PLRA, and the Constitution.

CONCLUSION

The Court should grant the Petition for Certiorari.

Respectfully submitted,

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